

JAN 12 2007

**EMPLOYER STATUS DETERMINATION**  
**Blue Rapids Railway Company**  
**Georgia Pacific Corporation**

This is the determination of the Railroad Retirement Board concerning the status of the Blue Rapids Railway Company (Blue Rapids) as an employer under the Railroad Retirement Act (45 U.S.C. 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. 351 et seq.). The status of this company has not been previously considered.

The history of Blue Rapids is outlined in a series of decisions under the Interstate Commerce Act. The first decision recites that Blue Rapids was formed in 1994 as a wholly-owned subsidiary of Georgia Pacific Corporation to acquire from the Union Pacific Railroad and to operate ten miles of track in Kansas. This rail line, known as the "Bestwall Branch", runs from Bestwall to an interchange with the Union Pacific trunk rail line at Marysville. Blue Rapids Railway Co.—Acquisition and Operation Exemption—Rail Line of Union Pacific Railroad Co., Finance Docket No. 32483, 59 Fed. Reg. 18827 (April 20, 1994). The notice stated in a footnote that Union Pacific had suspended service over the line due to flood damage in 1993, and Blue Rapids would repair the track as necessary to restore operation.

The April 20 Interstate Commerce Commission (ICC) decision also stated that Blue Rapids' acquisition would consummate on or after April 1, 1994. Shortly afterward, the Northeast Kansas & Missouri Division, Mid-Michigan Railroad (Mid-Michigan), filed a notice of exemption with the ICC to operate the line under an agreement with Blue Rapids. See: Northeast Kansas & Missouri Division, Mid-Michigan Railroad, Inc.—Trackage Rights Exemption—Blue Rapids Railway Company, Finance Docket No. 32529, 59 Fed. Reg. 34866-67 (July 7, 1994). Five years later, the Union Pacific assumed operation of the Blue Rapids rail line as part of Union Pacific's acquisition of the entire 107 miles of Northeast Kansas & Missouri Division rail line. See: Union Pacific Railroad Company—Trackage Rights Exemption—Blue Rapids Railway Company, Finance Docket No. 33720, 64 Fed. Reg. 16780 (April 6, 1999); and Union Pacific Railroad Company—Acquisition and Operation Exemption—Mid Michigan Railroad Company, Inc., Finance Docket No. 33652, 64 Fed. Reg. 18965-66 (April 16, 1999). The April 6, 1999 Union Pacific—Blue Rapids decision noted "There is one shipper on the line located at Bestwall."

As noted above, Blue Rapids at time of formation was a wholly-owned subsidiary of Georgia Pacific Corporation, which in 1994 owned seven other short line rail carriers. See: Exemption; Georgia Pacific Corporation—Continuance in Control Exemption—Blue Rapids Railway Co., Finance Docket

No. 32484, 59 Fed. Reg. 18827 (April 20, 1994). In 2005, Georgia Pacific Corporation was itself acquired by Koch Forest Products, Inc. Koch Forest Products is a subsidiary of Koch Industries, which through another subsidiary (Koch Cellulose, LLC) owns Old Augusta Railroad Company LLC (BA 5590), and formerly owned Old Augusta Railroad Company (BA 4563) See B.C.D. 04-41, *Old Augusta Railroad LLC*). According to the notice of this transaction filed with the Surface Transportation Board, Georgia Pacific owned at that time only one rail carrier, Gloster Southern Railroad Company (RRB BA 2583). At conclusion of the transaction with Georgia Pacific, Koch Industries through subsidiaries owned the Blue Rapids, the Old Augusta, and the Gloster Southern. See: Koch Forest Product, Inc. and Koch Industries, Inc.—Acquisition of Control Exemption—Gloster Southern Railroad Company and Blue Rapids Railway Company, Finance Docket No. 34784, 70 Fed. Reg. 76912 (December 28, 2005).

Additional information has been provided to the Chief of the Board's Audit and Compliance Division by David H. Coburn, attorney for Blue Rapids. Mr. Coburn stated in a letter dated March 24, 2006, that the Blue Rapids rail line connects a gypsum plant owned by another Georgia Pacific subsidiary, Georgia-Pacific Gypsum in Bestwall, to the junction with the Union Pacific at Marysville. He stated that Blue Rapids has no employees and owns no locomotives or rail cars, and that throughout its history, Blue Rapids has contracted first with Mid-Michigan and then with Union Pacific to provide freight service. The rail line is maintained through contract with an unrelated non-rail carrier firm. Management and accounting for the present operation of the line by Union Pacific is performed by employees of Georgia Pacific at its corporate headquarters in Atlanta. Mr. Coburn states that "These non-rail employees work full time for [Georgia Pacific], devoting only *de minimis* amount of their time (measurable in a small number of hours per year) to [Blue Rapid's] business."

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

- (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;

Section 1 of the RUIA contains essentially the same definition, as does section 3231 of the Railroad Retirement Tax Act.

Where a line of railroad is owned by one entity but operated as a rail carrier by a second, unrelated entity, the RRA, the RUIA and the Railroad Retirement Board's regulations do not directly address the status under the Acts of the lessor

company as an employer. In November 2000, the Board defined the circumstances under which it would consider that the lessor-owner of a rail line leased to another would be a rail carrier employer under the Acts. See Board Coverage Decision 00-47, *Railroad Ventures, Inc.*, (reconsideration decision). Pursuant to that decision, the Board will determine the lessor of a rail line to be an employer unless:

- (1) the lessor does not have as a primary purpose to profit from railroad activities;
- (2) the lessor does not operate or retain the capacity to operate the rail line; and
- (3) the operator of the rail line is already a covered employer under the RRA and RUIA. See: B.C.D. 04-11, *Sierra Pacific Industries, Inc.*

In the judgment of the Board, Blue Rapids meets all three Railroad Ventures criteria. Georgia Pacific incorporated Blue Rapids to repair the damaged Bestwall rail line and restore rail service to the Georgia Pacific Gypsum plant, indicating the primary purpose of the line was to arrange rail service for its subsidiary rather than to profit from rail carrier service to others. From the inception of its twelve years of existence, Blue Rapids has never conducted rail carrier service itself over the line, and has no rolling stock or locomotives. Blue Rapids therefore has never operated as a rail carrier, and though as a rail carrier subject to the Interstate Commerce Act it may be said to retain an obligation to provide service (see B.C.D. 04-11 *Sierra-Pine LLP*), Blue Rapids has no capacity to provide service itself except through operating agreement with another rail carrier. Finally, both the prior lessee operator, Mid Michigan Railroad Company, and the current lessee, Union Pacific Railroad, are covered employers under the RRA and RUIA, identified as employer numbers BA 4268 and BA 1713, respectively. Individuals performing rail service over Blue Rapids' rail line consequently were employees of a covered employer under the RRA and RUIA. Based on the evidence of record, the Board consequently determines that Blue Rapids is not and has never been a covered rail carrier employer under the Acts.

The Board notes that the Georgia Pacific Corporation has previously been determined not to be a covered employer under the Acts because the services it performed to the subsidiary rail carriers was casual service within the meaning of the Board's regulations (20 CFR 202.6). See L-91-91, *Georgia Pacific*

*Corporation*. The evidence of record furnished by attorney for Blue Rapids does not indicate that circumstances have changed since 1991 such that a new decision regarding that company is warranted.

Original signed by:

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